

a necessary party plaintiff, but not a necessary party defendant, because it is averred that Cape Girardeau county is made a defendant because it has refused to join in the suit as a party complainant. In my judgment, the county may be left out of the controversy. The real question to be determined in this case is whether the commissioner's deed, under which Alt claims title, should be canceled and annulled. The only necessary parties to the settlement of that controversy, as before stated, are the board of education and the defendant Alt, who is an alien. The record discloses no reason why the case should be remanded to the state court, and the motion to reman^d is therefore overruled.

STATE OF MISSOURI, to Use of PUBLIC SCHOOL FUND OF NEW
MADRID COUNTY, v. NEW MADRID COUNTY et al.

(Circuit Court, E. D. Missouri, E. D. March 17, 1896.)

No. 3,899.

REMOVAL OF CAUSES—DIVERSE CITIZENSHIP—FORMAL AND NECESSARY PARTIES.

The state of Missouri granted to the county of M. the swamp lands, donated to the state by congress and located in said county, to be drained and sold for the benefit of the school fund of the county. Many years after such grant, a bill in equity was filed, in a state court, by the state, on behalf of the school board of M. county, against that county and sundry persons, citizens of other states, alleging that the county had committed various breaches of trust in the disposition of the lands so granted to it, by disposing of them without consideration, or for purposes not within the trust, by misapplying moneys received from their sale and otherwise; that the conveyances so made were fraudulent and void; that the lands, so disposed of in breach of the county's trust, had come to the hands of the other defendants, with knowledge of such breaches of trust,—and praying that such conveyances be set aside, and the land restored to the county and for general relief. The defendants, other than the county, sought to remove the cause to the federal court, on the ground of diverse citizenship. *Held*, that the county of M. was a necessary, and not merely a formal, party to the suit, and an adversary party to the complainant, and, such county and the real complainant in interest being both citizens of Missouri, the suit could not be removed.

In Equity.

Lee & McKeighan, H. N. Phillips, and C. L. Keaton, for complainant.

R. B. Oliver and Brown & Geddes, for defendants.

ADAMS, District Judge. This cause came here by removal from the circuit court of New Madrid county. The complainant now appears by counsel, and moves to remand the cause for the alleged reason that the same does not present a controversy "wholly between citizens of different states," and is, therefore, not removable to this court. Although the cause is instituted in the name of the state of Missouri, it is manifest, from the statute under which it arises (Rev. St. 1889, § 8040), that the real party complainant is the school board, for and in behalf of the common schools of New Madrid county, and, as such, is a citizen of the state of Missouri, within the mean-

ing of the act of congress relating to removal of causes. The defendants are all, with the exception of New Madrid county, citizens of states other than Missouri. New Madrid county, being a municipality of the state, is a citizen of the state, within the meaning of such act. If, therefore, the county is a necessary party to this cause, it does not present a controversy wholly between citizens of different states, and is not removable to this court. If, on the other hand, the county is a mere nominal party, and not a necessary party, the controversy is wholly between the school board, acting in behalf of the public schools of the county, and the other defendants, who, as already seen, are citizens of other states, and the cause is removable to this court. The question for determination, therefore, is whether New Madrid county is a necessary party.

The bill of complaint shows that, by act of congress approved September 28, 1850, the United States granted to the state of Missouri certain swamp and overflowed lands, to be drained and reclaimed for the ultimate benefit of the public schools of the state; that the state of Missouri afterwards, by different acts of its general assembly, granted such of these lands as were located in New Madrid county to that county, to be drained and reclaimed by it, and afterwards sold at not less than \$1.25 per acre, the net proceeds thereof to become a part of the common school fund of that county; that, by the provisions of such acts, the county court of said county alone had the right to make the sales and issue patents for the lands sold, provided, however, that this should be done only after full payment of the purchase price therefor had been made. It appears that New Madrid county, as a municipality, became vested with the legal title of the swamp and overflowed lands in its territory, in trust for the benefit of the common schools of the county, and that an elaborate scheme was devised by the legislature of the state for the execution of the trust, so as to secure proceeds of the sale of the lands, in money, for the benefit of the school fund of the county. It further appears, as averred in the bill of complaint, that said county, by and through its county court, committed divers breaches of trust in handling and disposing of said lands, as follows: That it disposed of large tracts thereof without consideration, and particularly without securing the upset price fixed by the acts of the general assembly therefor; that it donated other large tracts of said lands to a certain alleged corporation, or to its stockholders, ostensibly for the purpose of draining and reclaiming the same, but really as a subsidy only, to secure the construction of a railroad through the county; that it conveyed other portions thereof to divers persons in order to secure the dismissal of certain suits instituted by them against the county of New Madrid; that the county court required the payment, in one instance, of \$10,000 as partial consideration for a conveyance, and that no part or portion of said sum, or other proceeds of the sale of said lands, was ever turned over to the school fund of said county; that all said transactions were made contrary to law, and in violation of the trust imposed upon the county by the act of congress (*supra*) and the several acts of the general assembly above referred to; that said county, by and through its county court,

combined, confederated, and conspired with the other defendants in this cause, to so dispose of said lands, in the way and manner aforesaid, as to deprive the school fund of the benefit thereof. It is further alleged, in the bill of complaint, that for the reasons aforesaid, and other similar reasons set forth at great length, all said conveyances and transfers of the lands, which are particularly described in the bill of complaint, were fraudulent and void, and that the defendants, other than New Madrid county, now hold, either by direct or mesne conveyance from said New Madrid county, with full knowledge of the facts aforesaid, deeds or patents to said lands, and claim to be the beneficial owners thereof. The complainant prays that all the contracts, deeds, patents, and conveyances so made by said county be set aside and for naught held, and that all of said lands be restored to the possession of said county, to be held and disposed of by it for the purposes of the trust conferred upon it. There is also a prayer for general relief.

It is manifest, from this very general analysis of the bill of complaint, that the county of New Madrid is charged with a direct and willful breach of trust in transferring the title to the lands described in the bill of complaint to the defendants or their grantors, through whom they claim. By virtue of the acts of the general assembly creating the trust above referred to, New Madrid county undoubtedly became a statutory trustee, charged with the duty of so disposing of the swamp and overflowed lands within its territory as to create a fund for the benefit of the common schools of the county. It, and it alone, had the power to act as such trustee, and one of the purposes, if not the main purpose, of the bill of complaint in this case is to restore to the county the legal title to the lands in controversy, and to compel the county to proceed and execute the trust imposed upon it by law. Divers contracts, deeds, and conveyances are alleged to have been made by the county in the execution of a scheme to defraud the schools, and deprive them of the lands in controversy. In order to do complete equity in this cause, it will be entirely proper and necessary, in the event the complainant prevails, not only to set aside the deeds and conveyances under which the defendants claim the land in controversy, but to reinvest the title to said lands in the county, with directions to proceed and execute the trust imposed upon it by law; and, under certain possible contingencies, it may be proper and necessary to require the county to account in this action for a diversion of the trust funds. The county is, therefore, essentially an adversary party to the complainant in this cause. It is a trustee charged with having fraudulently disposed of trust property, and is a necessary party to a suit against the fraudulent grantees to reclaim the same. This proposition has been recognized and asserted in numerous cases in the supreme court of the United States and in the circuit court of appeals, and must be regarded as the settled doctrine of this court. The leading cases are: *Barth v. Coler*, 9 C. C. A. 81, 60 Fed. 466; *Wilson v. Oswego Tp.*, 151 U. S. 56, 14 Sup. Ct. 259; *Thayer v. Association*, 112 U. S. 717, 5 Sup. Ct. 355; *Peper v. Fordyce*, 119 U. S. 469, 7 Sup. Ct. 287; *Rust v. Silver Co.*, 7 C. C. A. 389, 58 Fed.

611; *Railway Co. v. Wilson*, 114 U. S. 60, 5 Sup. Ct. 738; *Crump v. Thurber*, 115 U. S. 56, 5 Sup. Ct. 1154. Applying the doctrine of the foregoing authorities, New Madrid county cannot be held to be a mere nominal party in this cause. On the contrary, it is an indispensable and necessary party to a complete disposition of the matter in controversy, and, inasmuch as it is a citizen of the same state with the complainant, the cause was not removable to this court on the ground of diverse citizenship, and the motion to remand must be sustained.

My attention has been called to an opinion in the case of *Missouri v. Alt*, 73 Fed. 303 (decided *in nisi prius* by Judge Thayer), as direct authority in a similar cause for a different conclusion than that reached by me. I have carefully considered the opinion in that case, and it is manifest that the facts there presented to the court were essentially different from the facts shown in the bill of complaint in this cause. So far as disclosed by the bill, the county of Cape Girardeau was there but a nominal party. Again, in that case it clearly appears that the county was not an adversary party to the complainant. It appears, by the opinion, that the county refused to join as a complainant in the cause, and was therefore made a defendant. For this reason the court held that, in the arrangement of parties for the purpose of determining jurisdiction, the county should be treated, as complainant's counsel obviously treated it, as the same in interest with complainant, and in no sense an adversary party. The case last referred to is therefore not applicable to the facts of the case now before the court.

HERNDON v. SOUTHERN R. CO.

(Circuit Court, E. D. North Carolina. April 7, 1896.)

REMOVAL OF CAUSES—LOCAL PREJUDICE—NOTICE.

An application for the removal of a cause from a state to a federal court on the ground of local prejudice, under the act of congress of March 3, 1887 (amended August 13, 1888), should not be granted without giving to the plaintiff notice and an opportunity to be heard, though the court has power to grant the application *ex parte*.

F. H. Busbee, for the motion.

SEYMOUR, District Judge. It appears, from a proper reading of the act of March 3, 1887, that, in cases where there is a controversy pending in a state court between a citizen of the state in which the suit is brought and a citizen of another state, any defendant, being a citizen of another state, may remove such suit into the United States circuit court, when it shall be made to appear to the circuit court that, from prejudice or local influence, he will not be able to obtain justice in such state court, or in any other state court to which defendants may, under the laws of the state, have the right, on account of such prejudice, to remove said cause. The subsequent clause, in regard to the right to remand, appears only to apply to cases removed under the former law, under which an affidavit

not assigning any grounds of belief was sufficient to authorize a removal. It allows the court, on motion to remand, to examine into the truth of the affidavit for removal, and the grounds thereof. In a removal for local prejudice, under the act of 1887, the court is required to make such examination before removal. A motion to remand is merely, in such case, a motion for a rehearing of the grounds of the original motion. But, this being the law, the motion for removal ought not to be decided without notice, and an opportunity to present affidavits on the part of the party opposing. This has not been given in this case. It is true that the right to remove on *ex parte* affidavits exists. In *re Pennsylvania Co.*, 137 U. S. 451, 11 Sup. Ct. 141. In that case Bradley, J., says:

"Our opinion is that the circuit court must be legally (not merely morally) satisfied of the truth of the allegation that, from prejudice or local influence, the defendant will not be able to obtain justice in the state court. * * * The amount and manner of proof required in each case must be left to the discretion of the court itself. If the petition for removal states the facts upon which the allegation is founded, and that petition be verified by affidavit of a person or persons in whom the court has confidence, this may be regarded as *prima facie* proof sufficient to satisfy the conscience of the court. If more should be required by the court, more should be offered."

See, also, *Fisk v. Henarie*, 142 U. S. 459, 12 Sup. Ct. 207.

In *Adelbert College of Western Reserve University v. Toledo, W. & W. Ry. Co.*, 47 Fed. 836, Jackson, J., says:

"There is no requirement in the statute that the opposing side shall have notice of the application to remove, and be allowed an opportunity to be heard thereon. It would, perhaps, be better practice to give the opposite party notice of the application to remove, before action thereon by this court."

In making the precedent for the practice in this district, I am unwilling to grant the motion to remove without a hearing. The same course was pursued in *Springer v. Howes* (heard last December) 69 Fed. 849. In this case no allegations in regard to any other county than Durham were made. This, however, I do not consider material. After a full hearing in *Springer v. Howes*, and after argument by very learned counsel, I decided that a defendant had no absolute right to a removal to an adjacent county under the state statute, and that it was sufficient if the circuit court be satisfied that a fair trial could not be had in the county in which the venue was laid. *Smith v. Lumber Co.*, 46 Fed. 822. The decision of the motion to remove is continued, that 10 days' notice of the motion may be given to defendant.

DECKER et al. v. WILLIAMS.

(District Court, D. Alaska. March 11, 1896.)

1. DISTRICT COURT OF ALASKA—JURISDICTION—APPEALS FROM UNITED STATES COMMISSIONERS.

This court has no jurisdiction over cases brought here by appeal from United States commissioners, acting as justice courts under the statutes of Oregon, unless the amount involved is \$200 or more. Organic Act, § 7; 23 Stat. 24; 1 Supp. Rev. St. p. 430.